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Supreme Court, U.S.
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IN THE
Supreme Court of the United States

ELVIS KOBS,

Petitioner,

v.

UNITED WISCONSIN INSURANCE COMPANY, —
Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

LAURA W. BRILL
Counsel of Record

TED M. SICHELMAN
IRELL & M. NELLA, LLP
1800 Avenue of the Stars
Los Angeles, California 90067
(310) 277-1010

JASON W. WHITLEY
NOVITZKE, GUST, SEMPFF &
WHITLEY
314 Keller Avenue North,
Suite 399
Amery, Wisconsin 54001
(715) 268-6130

Counsel for Petitioner Elvis Kobs

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QUESTIONS PRESENTED

- (1) Whether an insurance company that both funds and makes discretionary benefits determinations under a plan governed by the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq., inherently acts under a conflict of interest to be considered in the judicial review of a denial of benefits under 29 U.S.C. § 1132(a)(1)(B).
- (2) If the answer to the first question is "yes," the following question is presented: Whether the appropriate means to consider a conflict of interest of an insurance company in such an action is *de novo* review, a "burden shifting" test, a "sliding scale" test, or some other means.

PARTIES TO THE PROCEEDINGS BELOW

The only parties to this proceeding are named in the caption.

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Peter A. Meyers, Comment, <i>Discretionary Language, Conflicts of Interest, and Standard of Review for ERISA Disability Plans</i> , 28 Seattle U. L. Rev. 925 (2005).....	23
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PETITION FOR A WRIT OF CERTIORARI

Petitioner Elvis Kobs respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit (Pet. App. 1a-9a) is published at 400 F.3d 1036. The court of appeals' order denying rehearing and rehearing en banc (Pet. App. 21a) is unpublished. The opinion of the district court (Pet. App. 10a-18a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 2005. Petitioner's timely request for rehearing and rehearing en banc was denied on April 26, 2005. On July 11, 2005, Justice Stevens granted an extension of time in which to file the present petition until September 23, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

In relevant part, 29 U.S.C. § 1132(a)(1)(B) states:

(a) Persons empowered to bring a civil action
A civil action may be brought--

(1) by a participant or beneficiary--

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan[.]

STATEMENT

This case presents the question whether an insurance company that funds and makes discretionary benefits determinations (hereinafter, a “dual-role insurer”) under a plan governed by ERISA inherently acts under a conflict of interest to be considered in reviewing denials of benefits under 29 U.S.C. § 1132(a)(1)(B). Since this Court’s decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989), this question has deeply divided eleven circuit courts of appeal. Acknowledging this square circuit conflict, the Seventh Circuit decided in this case that a dual-role insurer does not act under such an inherent conflict.

Because, contrary to the judgment of the Seventh Circuit, a dual-role insurer does act under such an inherent conflict of interest, this case presents the additional question of whether the appropriate means to consider the conflict is *de novo* review, a “burden shifting” test, a “sliding scale” test, or some other means. The question of the appropriate consideration of a conflict of interest has also deeply divided the circuits, with at least three different prevailing approaches in effect among eleven circuit courts.

1. In January 2002, while removing Christmas ornaments from the roof of his house, 50-year-old Petitioner Elvis Kobs fell 35 feet onto concrete pavement and suffered severe injuries, including memory loss, cognitive difficulties, recurring headaches, and musculoskeletal injury to his back and legs. Pet. App. 1a, 54a-71a. At the time of his fall, Mr. Kobs was employed as a business manager at an auto dealership, earning about \$85,000 per year. *Id.* at 47a-49a. Mr. Kobs was a participant in his employer’s group disability plan (hereinafter, the “Plan”), which is administered by the United Wisconsin Insurance Company (“UWIC”). *Id.* at 1a. UWIC is a dual-role insurer in that it administers the